Frey Mechanical Contractors, Inc. *and* Plumbers Local Union #68, United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO. Cases 23-CA-9084, 23-CA-9102, 23-CA-9110, and 23-CA-9133

30 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 4 November 1983 Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in support of the administrative law judge's recommended decision and order, and the Charging Party filed an answering brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Frey Mechanical Contractors, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b).

"(a) In the event the Respondent's operations at the Holiday Inn project are still in progress or in the event that Kurt Coppock, Donald Olson, Kenneth Slicker, William Bruce, Charles Hunsucker, or Stanford Daniel would have been transferred to another project upon its completion, offer them immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and make them whole for any loss of pay that they may have suffered by reason of the discrimination against them in the manner and to the extent set forth in 'The Remedy' section of the administrative law judge's decision. If the above-named employees would have been terminated in the normal course of business, the Respondent shall make them whole for any loss of pay they may have suffered by reason of their discharges and assure them of their future eligibility for employment by the Respondent in the manner set forth in footnote 4 of this Decision and Order.

"(b) Post at its place of business in Houston, Texas, and if it is still continuing to do work at its Holiday Inn jobsite, to also post there, copies of the attached notice marked 'Appendix.' Copies of the notice, on forms provided by the Regional Director for Region 23, after being signed by the Respondent's authorized representative, shall be

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[1] The Respondent's motion that the Board remand this case for rehearing so that the Respondent may present additional evidence as to the business purpose of the camera used to photograph the uncoupled pipe involved in Olson's discharge is hereby denied. The Respondent had ample opportunity to present evidence on this issue at the hearing and in fact elicited such testimony from all but one of its witnesses. Additional evidence on this point would not change the outcome of this case.

We agree with the Respondent that the record shows that the camera was purchased on 27 September 1982 rather than the day after the election, as found by the judge. Our correction of this finding does not affect the result we reach.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct the judge's apparently inadvertent error in finding that Daniel was discharged on 16 November 1982. The preponderance of evidence, including R. Exh. 8, establishes that Daniel was discharged on 12 November, although he was not informed of this until 16 November.

[3] In agreeing with the judge that the Respondent had knowledge of its discharged employees' union activity and sympathies we do not rely on the judge's citation and discussion of *Wright Plastic Products*, 247 NLRB 635 (1980).

[4] We amend that portion of the judge's proposed remedy wherein the Respondent is required to offer immediate and full reinstatement to the six discriminatees. The record indicates neither when the Respondent's Holiday Inn project actually terminated, nor what the Respondent's hiring or transfer practice was with regard to subsequent projects. It is therefore uncertain whether these employees would have been terminated in the normal course of business sometime after their discharge. Accordingly, if in compliance proceedings it is determined that the employees would have been transferred to another of the Respondent's worksites on completion of the Holiday Inn project, the Respondent shall offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings in the manner set forth in "The Remedy" section of the judge's decision.

In the event the Respondent establishes that the employees would have been terminated in the normal course of business, the Respondent need not offer them reinstatement but shall make them whole for any loss of earnings they have suffered by reason of the discrimination against them from the date of their discharges to the date they would have been terminated normally. The Respondent shall also send letters to them stating that, notwithstanding their discharges, they will be considered eligible for employment on a nondiscriminatory basis at any of the Respondent's future projects, should they choose to apply for employment. See *Al Monzo Construction Co.*, 198 NLRB 1212, 1219 (1972), cited in *Brown & Lambrecht Earth Movers*, 267 NLRB 186 (1983); *State Wide Painting & Decorating Co.*, 174 NLRB 5 (1969).

We also find merit in the Respondent's exception to that portion of the judge's proposed remedy requiring posting of a notice at its El Paso, Texas office. We shall order the Respondent to post copies of the notice at its Houston offices and at the Holiday Inn if the project is continuing, and to mail copies of the notice to all persons employed by it at the Holiday Inn project, using their current mailing addresses as approved by the Regional Director for Region 23.

posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition, Respondent shall mail copies of that notice to all persons employed by it on its Holiday Inn job, using their current mailing addresses as approved by the Regional Director for Region 23."

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraph.

"(c) Expunge from its files any reference to the unlawful discharge of the above-stated employees and notify them, in writing, that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against them."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees concerning their and other employees' support for the Union.

WE WILL NOT threaten employees with discharge if they choose the Union to represent them.

WE WILL NOT discourage membership in Plumbers Local Union #68, United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, or any other labor organization, by discriminating against our employees in regard to their hire or tenure of employment or any other terms or conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you under the Act.

WE WILL offer to Kurt Coppock, Donald Olson, Kenneth Slicker, William Bruce, Charles Hunsucker, and Stanford Daniel immediate and full reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent positions, without loss of seniority or other rights and privileges, if we have not completed operations at the Holiday Inn jobsite or if they would have been transferred to another job upon its completion or otherwise. WE WILL assure the above-named employees that they are eligible for future employment by us.

WE WILL expunge from our files any references to the unlawful discharges of the above-stated employees and notify them, in writing, that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against them.

FREY MECHANICAL CONTRACTORS, INC.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Based on charges filed on October 4, 12, 13, 19, and 26, and November 18, 1982, by Plumbers Local Union #68, United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the Union), the Regional Director issued his second amended consolidated complaint on March 14, 1983, alleging that Frey Mechanical Contractors, Inc. (the Respondent) by its actions before and after a union election and by its discipline and discharge of employees Kurt Coppock, Donald Olson, Kenneth Slicker, William Bruce, Glen Boatwright, Charles Hunsucker, and Stanford Daniel has violated Section 8(a)(1) and (3) of the Act. The case was heard before me on May 4 and 5, 1983, in Houston, Texas. Briefs were received from all parties.

On the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

The Respondent is engaged in plumbing and heating contracting, with its principal place of business in El Paso, Texas. In its answer the Respondent admits that it is an employer within the meaning of the Act and that it is engaged in a requisite amount of interstate commerce and I find that it will effectuate the policies of the Act to assert jurisdiction in this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

Plumbers Local Union #68, United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

The Respondent is a plumbing and heating contractor doing business in and around El Paso, Texas. It had been doing business in the Houston area for 14 months prior to this hearing and had been working on one job located at the Holiday Inn, 2222 West Loop South. The prefabrication work for the job began in March 1982, with the jobsite work beginning in June 1982. The Respondent employed Kurt Coppock, Donald Olson, Kenneth Slicker, William Bruce, Glenn Boatwright, Charles Hunsucker, and Stanford Daniel as plumbers and plumbers helpers at this jobsite. Olson and Coppock were hired in March as journeymen plumbers. Olson was the first plumber hired by the Respondent for the project. Olson, Coppock, and about six or seven other plumbers and plumbers helpers first worked at the Respondent's shops, about 15 miles from the jobsite, preparing materials for the job until June when the Respondent shifted the main portion of its operations to its jobsite and its plumbers and plumbers helpers moved to that location.

Slicker and Bruce were hired in August as journeymen plumbers and worked only at the actual jobsite. In July and August the Respondent hired Boatwright, Hunsucker, and Daniel as plumbers helpers.

In late July and early August the Union conducted an organizational campaign among the plumbers and plumbers helpers employed by the Respondent at its Holiday Inn jobsite. Olson and Coppock were activists in this campaign and were responsible for passing out union authorization cards to fellow employees. Together they obtained approximately 10 or 11 signed authorization cards and on August 27, 1982, the Union filed a petition for a representation election with the Board. The Respondent received a copy of the petition on August 30, 1982.

On Thursday, September 23, at 7 a.m., an election was held. The names of 18 eligible voters appeared on the "*Excelsior*" list and 17 of these employees voted. The Union received nine votes and the Respondent received six votes. Two of the Respondent's supervisors Michael Callan and Louis Pierce voted challenged ballots which were not counted and were not determinative of the results of the election. Donald Olson acted as the Union's observer at the election.

At the time of receiving the petition for representation election, the Employer began, with advice of legal counsel, to conduct an election campaign prior to the election of September 23. During this campaign, various speeches were delivered to the employees and various handouts were given to the employees.

After the election, the Union was certified by the Board as the bargaining representative for the employees of the Respondent at the Holiday Inn jobsite. The Union and the Respondent became involved in negotiations in the fall of 1982 and such negotiations were ongoing at the time of the hearing.

B. *Allegations Relating to Statements and Alleged Interrogations of Employees During the Respondent's Antiunion Campaign*

1. Alleged statements by Supervisor Michael Callan

Kurt Coppock and Don Olson passed out authorization cards during the Union's campaign and Coppock also signed a union authorization card himself on August 26. Coppock testified that on August 23 the Respondent's supervisor Michael Callan asked him if anyone from the Union had been on the jobsite talking with Coppock or "anyone else." Coppock responded, "no." Callan then told Coppock that "if the Union had been down there, there would be trouble." Coppock testified that Callan also stated, "if the Union was to come on to that job, we would more than likely be looking for jobs elsewhere." In his testimony Callan admitted asking Coppock, as well as all other employees, if anybody had been on the jobsite connected with the Union asking about union activities. However, his testimony is that he told Coppock that if the Union came on the job that he would start looking for another job himself. He further testified that he explained to Coppock that what he meant by this statement was that he did not intend to work for a union company.

Richard Baker testified that he was hired by the Respondent as a plumber's helper in June and that he signed a union authorization card on August 26. Baker also testified that about September 1 Callan came up to him in the basement asking if he had "been talking to any members of the Union," or if he had been contacted by any union at all. Baker responded, "no."

Kenneth Slicker testified that he was hired by the Respondent on August 27 as a plumber and that he signed a union authorization card on August 31. Slicker testified that on September 1, Callan asked if he had "been approached by the Union?" Slicker responded, "no."

William Bruce testified that he was hired by the Respondent as a journeyman plumber about August 23, and that he had signed an authorization card on August 26. Bruce testified that on September 1 Callan came to him and, "wanted to know did I hear anything about the Union . . . did I overhear anybody talking about bringing the Union on to the job," and "he wanted to know what did I think about the Union." Bruce testified he responded that he thought the Union was "mostly good."

Callan testified that he engaged in these interrogations "on his own without the knowledge of anyone else," presumably other members of management. Accordingly, though the Respondent was being advised by counsel on how to conduct an antiunion campaign, it must be concluded that at least at the time of the interrogations by Callan, he had not been so advised. He further testified that at the time of the interrogations all he knew about the campaign was from a flyer he had received upon returning from vacation. Based on the demeanor of the witnesses presented by the General Counsel in this regard, as well as that of witness Callan, and on the mu-

tually corroborative testimony of the witnesses for the General Counsel, I credit the testimony of employees Coppock, Baker, Slicker, and Bruce in the instances in which it conflicts with that of Callan.

2. Alleged statements by Supervisor Unrein

Employee Slicker testified that before he was hired on August 27 the Respondent's job supervisor Fred Unrein asked him at a job interview how he felt about the Union or if he had "ever had any dealings with the Union." Slicker told Unrein that he was "indifferent about it." Slicker also testified that he signed the union authorization card on August 31, and that on the same day Unrein asked Slicker if he had been approached by the Union. Slicker responded, "no." Based on Slicker's demeanor and no direct denial by Unrein of this testimony, I credit Slicker's testimony.

Unrein admitted that on August 25 he asked most of the men on the jobsite if "somebody from the Union had consulted them on job time?" On this point the witness further testified, "I asked if there was a Union representative who had come down to talk to them. I wanted to know if there was a man on the job from the Union." In response to further questioning inquiring if that was all he said to the employees, Unrein replied, "sure." In response to his inquiry, Unrein stated that employee Richard Baker replied, "I know something about it, but I'm not going to say anything." Unrein also admitted that he asked employee Bill Bruce how he felt about the Union and received a reply to the effect that Bruce used to be a member of the Union "about 5 years previous to that," but he got hungry so he had to get on the street and get a job.

Unrein further testified that his interrogations of employees was to determine if a union representative was on the jobsite during working time as he was concerned about the disruption of work. However, this reason for the interrogation was not implicit in the questioning nor was it communicated to the employees.

3. Alleged statements by Supervisor Bill Littleton

After receiving notice of the representation petition and arriving at a consent stipulation as to scope, location, and site of the election and unit, the Company launched into its preelection campaign. Bill Littleton, the Company's Houston manager, was individually responsible for delivering campaign speeches prepared by the Company's attorney prior to the election. These campaign speeches were drafted with the purpose of informing and convincing the involved employees to vote against the Union at the upcoming election. With respect to the campaign, employee Coppock testified that about a week before the election he was working in the basement with employees Baker, Daniel, and Pierce when Littleton approached the group and passed around some antiunion propaganda. Coppock testified that Littleton told these employees that "if the Union were to come in, we would be out on the streets with the rest of the deadbeats."

Daniel corroborated Coppock's testimony stating that before the election Littleton came up to him, Coppock, and Baker in the basement and gave them sheets of paper describing "bad things about the Union, their expenses and things like that," and asked the employees in the group if they were going Union or not. Daniel responded that he was not sure. He testified that Littleton also told this group that the Respondent was not "going to tolerate anybody on the job that was going union." Baker testified that he was working in the basement approximately a week before the election with Daniel and Coppock when Littleton approached the group and gave a "talking." Littleton then stated to Baker, "I want to know how you feel about the Union?" Baker testified that he shook his head no, then Littleton responded, "Good, I want to talk to you all about this paper here, you know, about the union guys."

Coppock testified that on the Tuesday before the election he attended a safety meeting conducted by Littleton with all the other employees on the jobsite. According to Coppock, Littleton stated at this meeting that "Frey Mechanical did not need a union," and that if there were a union the employees would no longer be able to talk with Littleton or Unrein. Coppock also testified that Littleton stated that:

> [H]e knew that there was probably some union cards signed, that there was union infiltration—that he hoped there wasn't—that he would find out who they were, that the union people had been coming down to apply for work and that . . . Frey Mechanical did not need them people . . . he asked us to vote "no," he said he was probably saying some things that he shouldn't be.

Olson also attended a preelection safety meeting and testified about it as follows:

> And then he [Littleton] . . . said, anybody who would vote Union would be fired and he said I want you to know that anybody who votes Union will be fired. If I knew the instigator who was behind all this, I would fire him right now. He also said, you know, he said we have been getting a lot of job applicants and I know the Union is sending them in. We don't really need deadbeats . . . at Frey Mechanical. We don't need any of these deadbeats down here; they should be out on the street pounding the bricks like the others.

After this meeting, Olson testified that Littleton came up to him and asked him how he was going to vote. Olson also testified that he had attended a preelection safety meeting and heard Littleton say that "he knew that there were union instigators on the job," and "if he knew who they were he would fire them and throw them off the job . . . and if we wanted to join the Union we could join the rest of the deadeats out on the bricks."

Employee Bruce was also present at a preelection safety meeting and testified that Littleton read from a statement saying that:

> Frey did not want the Union on the job . . . and if there was anybody working for Frey that felt they wanted to work for the Union they ought to go out

> and find a job at a union shop and . . . even if the Union won the election, Frey did not have to bargain with anybody.

Bruce also testified that Littleton said "he wished he knew who these instigators were on the job so he could go ahead and fire them. If they wanted to picket they would be outside the fence picketing with the rest of those deadbeats out there." Littleton also admitted that he said to Donald Olson on September 23, after learning that Olson was the union observer, "he had fed him and his family for 6 months and Olson was the one that had brought in the Union."

Baker testified that immediately after Littleton saw Olson at the polls on the morning of the election, he saw Littleton walk up to Unrein and put his hand on Unrein's shoulder. Baker said he then saw Littleton point at Olson and say, "There's that son-of-a-bitch that started all the trouble." Slicker testified similarly.

Littleton admitted stating to a group of employees on September 20 that if the Union won the election the "employees would possibly be out with the other deadbeats." Littleton testified on this point that he was "referring to the strike that was called by the Union," and he had been reading from a prepared speech when he made this statement.

Littleton admitted that he told a Board agent during an investigation of this case that on the day of the election he commented to Unrein about Olson and stated, "there is the instigator of the whole matter right there." Littleton also admitted that he told a Board agent that he may have diverted from the speech on September 20 and made other comments. He also admitted asking employee Olson, on September 22, how he was going to vote at the Board election the next day. Littleton denied all the statements except the ones he specifically admitted or clarified.

Based on the demeanor and testimony of the witnesses, primarily of Manager Littleton, I credit the testimony of the witnesses presented by the General Counsel with regard to Littleton's statements during the campaign. For reasons stated at a later point in this decision with respect to the discussion of a camera purchased by the Company about the time of the election and testimony of Littleton and with respect to work rules being explained to employees at the time of their employment, I do not find Littleton's testimony to be as credible as those of the witnesses presented by the General Counsel.

There is no question that the record supports the conclusion that the Respondent harbored union animus. This animus was made clear to the employees by the interrogation of all of them by Supervisors Callan and Unrein and in the speeches and statements made to groups of employees and individual employees as set out above by Unrein and Littleton. Although the speeches given by Littleton with their references to consequences of strikes, what can happen during the course of bargaining and negotiations and references as to who would still be the boss even if the Union was voted in, may be lawful. I find that the interrogations by Callan and Unrein to be coercive and a violation of Section 8(a)(1) of the Act.

I find that Littleton's questioning of Olson in regard to his union sympathies, statements to employees that he knew that there were union instigators on the job and that he would fire them if he knew who they were and later pointing out Olson in the hearing of other employees as the instigator of the union activity likewise to be threatening and coercive and in violation of Section 8(a)(1) of the Act.

C. *Discharge and Discipline of Employees Following the Election*

At the election 17 employees voted, 9 voted for the Union, while 6 voted against it and 2 supervisors voted challenged ballots. Of the nine employees shown to be in support of the Union, seven were discharged within 2 months after the election. The General Counsel contends that these discharges were all motivated by the Respondent's union animus and were clearly an attempt to rid itself of union adherents. The reasons advanced by the Respondent for the employees' termination are urged by the General Counsel to be merely pretextual. The controlling Board decision on burden of proof in this proceesing is *Wright Line*, 251 NLRB 150 (1980). In *Wright Line*, the Board established the following causation test on all cases alleging violations of Section 8(a)(1) and (3) turning on employer motivation. It requires that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct.

Looking first at the burden of the General Counsel, I find that the record overwhelmingly establishes that the Respondent harbored union animus. The various statements made by the Respondent's supervisors, discussed in the previous section of this decision, likewise, make it clear that the Respondent desired to rid itself of those employees who were supporters of the Union. I find it significant that in the several months prior to the election, the Respondent had not seen fit to terminate any but one of its employees. The one employee terminated prior to the election was terminated within a few days of the election. Shortly after the election, the Respondent began terminating employees on a regular basis, all of whom happened to be union supporters. Based on the timing of the discharges and the Respondent's union animus, I agree with the General Counsel that he has made a prima facie showing that the discharges of Coppock, Olson, Slicker, Bruce, Hunsucker, and Daniel constitute a violation of the Act. I also find that the General Counsel has met his burden of proof showing that the Respondent had knowledge of these individuals union activities. In *Wright Plastic Products*, 247 NLRB 635 (1980), the Board held, through adoption of the administrative law judge's decision, the signing of union authorization cards was a sufficient act to infer knowledge of union activity to a respondent and that the lack of specific evidence of the Respondent's knowledge of individual employees and the difference in union activity between individual employees is immaterial when it is the general

desire of the respondent to frustrate and dissipate employees' support of the union. I find that to be the case in this proceeding.

However, the General Counsel presented further evidence of the Respondent's knowledge. All of the individuals charged testified that they signed union authorization cards. As Olson was the union election observer, the Respondent was certainly aware of his support of the Union. Slicker, Bruce, Boatwright, and Daniel all testified that they wore union stickers on their hats beginning about a week after the election. Supervisor Callan admitted that he had noticed some of the employees wearing such stickers. Employee Coppock was discharged before the practice of wearing stickers began, but was a close associate of election observer Olson. Coppock also helped in passing out union authorization cards. Hunsucker displayed a union sticker on his truck and frequently rode to work and ate lunch with Boatwright and Daniel who did wear union stickers. As found before, Bruce was questioned before the election by Littleton and in response to a question as to what his feelings were about the Union, stated that it was "mostly good." It is also significant that none of the six employees who voted against the Union were disciplined or terminated after the election. It should be noted that the Respondent, through the actions of its supervisor and general manager, conducted an interrogation of the employees before the election and had a fair opportunity to draw conclusions as to its employees support or lack thereof for the Union, if by nothing else observing the demeanor of the employees while interrogating them. Therefore, for the reasons stated, I find that the Respondent had knowledge of the protected activity of the involved discharged employees.

The Respondent asserts that it had legitimate business reasons for discharging each of the involved employees. I find that these reasons are pretextual. Prior to the union election, the Respondent had no written rules governing behavior of its employees. However, within a week or two after the election such written rules were distributed to the employees and formed a basis for the discharge of some of them. The Respondent's general manager Littleton testified that he had started work on these rules some months before the election, an assertion, which based on his demeanor during his testimony concerning this, I discredit. One of the discharged employees, Olson, was terminated for "sabotage" of a water pipe he installed on the jobsite. The Respondent introduced photographs of the broken pipe at the hearing. In this regard, the Respondent's manager Littleton testified that the camera with which the picture was taken was purchased in August for replacement of one which had been provided by a previous supervisor. However, at my request, the sales slip for the purchase of the camera was produced and showed that the camera was purchased the day after the union election. At the time the photograph of the water pipe was taken, Boatwright testified that he was present and saw Unrein take the photograph and heard Foreman Pierce say that the camera had been bought just for this reason. Based on all the testimony surrounding the purchasing use of the camera, I find that it was purchased just as another tool, like the rules, to help the Respondent rid itself of those employees who supported the Union.

As further evidence of the Respondent's intention to get rid of union adherents, Supervisor Unrein began keeping a daily diary of employees' activities after the election. The diary was later used to support the discharge of some of the involved employees.

It is clear to me from all the evidence that the Respondent began immediately after the election to find and document any reason it could to discharge those employees supporting the Union. It is in this context that the reasons given by the Respondent for the discharge of these employees must be viewed.

1. The discharge of Kurt Coppock

The Respondent's reason for the discharge of employee Coppock was incompetent workmanship on the job. Unrein testified that he terminated Coppock for his failure to properly secure anchors which were holding a 12-inch cast iron pipe. Unrein was informed by Coppock's fellow employees, Baker and Shultz, that Coppock was the employee who had set the faulty anchor. Coppock admitted to having set the anchor and at that point Unrein terminated him. At the time of Coppock's termination, Unrein also told him he was being fired for "poor work attitude." Two days after Coppock's termination employee Baker testified that an anchor he put in had fallen out and that Supervisor Pierce, who had seen Baker putting the anchor back in, told Baker, "Richard, you're going to have to do better than that." Baker replied, "What are you all going to do, you going to fire me too?" In response, Pierce said, "No, Kurt did not get fired for the anchor falling out. It was his attitude. He had a bad attitude." At the hearing and in further support of its reasons for firing Coppock, the Respondent advanced some other examples of what it considered poor workmanship on the part of Coppock, all of which occurred prior to the election. I find it significant that these other instances, which appear to be just as serious as the anchor incident, did not result in any warning to Coppock and certainly not in his termination. I find that the reasons advanced by the Respondent for the discharge of Coppock are pretextual and its real motive was to eliminate a union adherent.

2. The discipline and discharge of Donald Olson

Employee Olson was given a written warning on October 6, 1982, for talking with other employees about their wage rates. Olson admitted that he had engaged in such conduct on several occasions both before and after the election, but had not, beforehand, been warned not to engage in such conduct. Supervisor Unrein testified that various employees including Rick Lee had come to him complaining that Olson was questioning them about their wages. Unrein also testified that although there was no written policy he and Littleton for many years had always operated under the policy that, "you just don't stir up trouble by asking people what they make and how much they make and trying to stir something up." Littleton testified that when he hired Olson he informed him that his wage rate was his business and nobody

else's. However, at another point in the record, Littleton admitted that he had never told Olson that he would be disciplined or receive warnings if he discussed wage rates with other employees. Littleton also testified that it is not standard company procedure to issue written warnings to employees but that the written warning was issued to Olson after Littleton was advised by counsel to issue such a warning for documentation.

At the hearing, Olson complained of an instance shortly thereafter where he was required to work on a scaffold without a helper. However, the General Counsel did not urge this point on brief and it is considered waived.

On October 8, Olson was transferred from the Holiday Inn jobsite to the Respondent's prefabrication shop. The Respondent's personnel testified that the assignment of Olson to the shop was a temporary assignment estimated to last approximately a week. Olson's complaint about being transferred centers around the location of the shop in Houston. Because of distance he would have difficulty making a evening bible study in which he participated. On this point, I would find it difficult to determine whether or not the transfer constituted harassment or was in fact just a temporary assignment because on October 13 Olson was accused of sabotaging the job by failing to glue a pipe joint properly and was fired 2 days later. Olson did install the pipe about a week before it broke and it is Olson's testimony that he primed and glued all the joints on the pipe properly. He also testified that water pressure had been on the line for 4 or 5 days before its breaking. He further testified that he had been instructed by the foreman to install the pipe using the wire hangers, which Robert Robertson of the Union's apprentice school testified would make the pipe unstable and easily broken.

In any event, as noted by the Respondent on brief, considerable testimony was offered as to the cause of the pipe breaking. Further, as noted on brief, the cause of the break is not known conclusively. What is unusual to me about this situation is the fact that Olson, one of the first employees hired on the jobsite, would be terminated for something which actually did not cause any damage to the jobsite and for which the cause is so open for argument. At the hearing, the Respondent produced four more instances of alleged poor workmanship for which the Respondent stated that Olson had been reprimanded. However, there are no written warnings that were given to Olson with respect to these instances nor was he informed that he was subject to termination for the instances. Olson denied that he had been reprimanded for these instances. In all of the circumstances, having weighed all the evidence and reviewed the record, and upon the demeanor of the witnesses testifying about the circumstances surrounding Olson's discharge, I find that the real motive for discharging Olson was his union activity and not poor workmanship as alleged by the Respondent.

3. The discharge of William Bruce and Kenneth Slicker

The Respondent's personnel testified that Bruce and Slicker were terminated for excessive absenteeism and/or tardiness without an excuse. The Respondent pointed out that employees were expected to work a total of 40 hours per week. During the 8 weeks of his employment with Frey, Slicker worked a total of 40 hours in only 2 of those weeks. On the workweek ending October 1, Slicker worked a total of 9 hours. Supervisor Unrein testified that during the above-stated week Slicker was out sick and that his father had called in for him on September 29 to say that his son was out sick. He testified that he did not hear anything else from Slicker until October 1, when Slicker called in to have another man from the crew to bring his check to him. When questioned as to why he had not called in, Slicker stated that he was sorry, that he had, "relied on other people to call in for him." Unrein, at that point warned him that the next time he was late or tardy he was going to be terminated. In the next week, the week ending October 8, Slicker worked 40 hours. On the week ending October 15, on that Monday, Slicker worked 8 hours. On October 12, a Tuesday, he came in 10 minutes late, and Unrein told him he was going to let him go for his constant tardiness.

At another point in the testimony, Unrein pointed out that the Company does not make any notations of tardiness unless it is in excess of 15 minutes. Employees may be docked for tardiness in excess of 15 minutes. It is Slicker's testimony that he was only 5 minutes late on October 12. Slicker had never received any written warnings for being late and based on the testimony, primarily of Unrein, with respect to Respondent's practice with other employees, I find that Slicker's termination for being 5 or 10 minutes late on October 12 was again just another pretext for the Respondent's real motive.

The Respondent also asserts that it terminated employee Bruce for tardiness. The Respondent showed that Bruce had been 15 to 20 minutes late on October 12, 10 to 30 minutes late on October 13, and perhaps 30 minutes late on October 22, the date of his termination and also the date in which Unrein documented in his diary that Bruce was 40 minutes late. On the day previous, Unrein warned Bruce that if he was late again he would fire him and he did. The General Counsel, on brief, notes that another employee, Richard Pierce not a union supporter, often came in late for work. The timecards show that he was often absent from the job as well and was not discharged until early November 1982. Pierce though was rehired in December 1982. Based on the Respondent's practice with other employees, I find the reason given for Bruce's discharge to be pretextual.

4. The discharge of Charles Hunsucker and Bill Boatwright

Employees Hunsucker and Boatwright were allegedly terminated by the Respondent for their refusal to do assigned work. Hunsucker was assigned to work on a jackhammer in the basement of the Holiday Inn jobsite. He was terminated on October 5, 1982, when he refused to work on the jackhammer further. Fellow employee Stanford Daniel had been working on the jackhammer job with Hunsucker until he hurt his back on approximately October 1, and was off for a period of time. On October

5 Hunsucker's back started hurting and he complained to Pierce and Unrein and asked for relief. Unrein informed Hunsucker that if he could not run the jackhammer anymore he was fired.

Unrein testified that Hunsucker had told him that his back was not really hurting but rather just stiff and sore from operating the jackhammer. After Hunsucker was discharged, he went to a doctor, received a doctor's release, and returned to Unrein and asked if he could return to work. Unrein refused to allow Hunsucker to return. I find the Respondent's reason for Hunsucker's discharge to be pretextual as it had already relieved employee Daniel from the jackhammer duty for injury.

Boatwright was terminated for refusing to work as a helper with the welder. Boatwright testified that he informed Callan and Unrein that he was not learning plumbing work and he wanted to learn plumbing work rather than stand around and do nothing with a welder. He testified that before the election he had been performing plumber's helpers' tasks for Slicker. About 3 or 4 days after the election he was assigned to work with a welder. He was not told how long he would be working with the welder and also testified that the welder had previously been working without any assistance. Unrein testified that upon being asked by Boatwright to be moved to another position he had explained to Boatwright that the only work he had available for a helper was to work with the welder. He further stated that if Boatwright did not want to do the work he could quit whereupon Boatwright stated that he would not quit and Unrein terminated him. Boatwright testified that had he been willing to work as the welder's helper he would have been able to continue his employment. There is no showing that Boatwright's transfer from plumber's helper to welder's helper was motivated by the Respondent's union animus other than its timing. The work as a welder's helper was evidently no more difficult or onerous than that work which Boatwright had performed previously and evidently there was no differential in wages. Under the circumstances, I cannot find the transfer of Boatwright to constitute a constructive discharge and I find that Boatwright effectively quit his employment. Consequently, I also find that no violation of the Act was committed by the Respondent's actions regarding Boatwright.

5. The discharge of Stanford Daniel

Daniel was allegedly terminated for his failure to call in when he was unable to come to work. As noted above, Daniel's back was injured on October 1, while operating a jackhammer. After visiting a doctor, he returned to the job on October 5, and informed Unrein that he had a doctor's release until October 11. Unrein told him that he needed to call in and let the Company know how he was doing. On October 12, Daniel called in to say that his doctor had not yet released him and Unrein again asked him to let the Company know what progress he was making. From October 12 until November 1, when Daniel reported back, he called in to check with Unrein on a regular basis. On November 1 he came back to work and was injured the later part of the week on November 6, and had to go home early complaining of his back. On November 8 Daniel called in and stated that he was unable to come as he had been to a doctor and was given some medication which made him groggy. He also stated that he was going to take a plumbing test for school. Unrein advised him to keep in touch. From November 8 to 16, Unrein did not hear from Daniel. On November 16 he showed up at the job and was asked by Unrein why he had not reported. Daniel stated, "all the phones were out." At that point Unrein terminated him. Daniel testified that he was not aware of, nor had he received, any company rules on absenteeism or calling in procedures other than the copy of rules and regulations in the record as General Counsel Exhibit 9. Reference to this list does not state any procedure for calling in or penalities for failure not to do so. On November 8 when Daniel called in informing Unrein that he could not come in because of the medication that he was taking, Unrein told him to "keep in touch." Unrein stated that he did not tell him how often to call in. Unrein's journal entry for November 16, reads as follows: "Stan Daniel was here this morning and I fired him for not calling us of his absence. He said the phones were out of order so he couldn't call. Ha! Ha!" Unrein's journal for November 15, the day before Daniel's firing, points out that the jobsite shut down at 8:30 a.m.

In line with my earlier findings, I find that Daniel was terminated because of the Respondent's union animus and not for the reason stated. The Company has no written call-in rule and Daniel was not warned of the consequences of not calling in nor how often he should call in to avoid problems. I find that the reason given by the Respondent for the termination of Daniel was merely a pretext.

IV. CONCLUSIONS

A. *The 8(a) (1) Violations*

In view of the findings above, I find that the Respondent has violated Section 8(a)(1) of the Act by the conduct of Supervisors Callan, Unrein, and Littleton by coercively interrogating employees concerning their and other employees' support of the Union and by threatening its employees with discharge in the event of a union victory in the election.

B. *The 8(a)(3) Violations*

I have found above that the Respondent discharged seven employees, all but two of its employees who voted in favor of the Union in the Board election, within 8 weeks after the date of the union election and after the Respondent had expressed animosity and hostility to the Union in the form of violations of Section 8(a)(1) of the Act. As I have found above, the reasons advanced by the Respondent for these discharges are pretextual. I therefore conclude that the Respondent discharged six employees for its animosity and hostility to the employees' union activities. For the reasons set forth above, I have also found and conclude that the Respondent had knowledge of these employees' activities and its termination of them was motivated by its desire to discourage union membership and activity broadly, in violation of

Section 8(a)(1) and (3) of the Act. I have also found that the discharge of employee Boatwright does not constitute a violation of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By coercively interrogating its employees concerning union activities and by threatening its employees with discharge if they chose to be represented by a union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.
4. By discharging Kurt Coppock, Donald Olson, Kenneth Slicker, William Bruce, Charles Hunsucker, and Stanford Daniel, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) of the Act.

THE REMEDY

It having been found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act and to post an appropriate notice to its employees. It also having been found that the Respondent discharged employee Kurt Coppock on September 27, 1982; Donald Olson on October 15, 1982; Kenneth Slicker on October 12, 1982; William Bruce on November 22, 1982; Charles Hunsucker on October 3, 1982; and Stanford Daniel on November 16, 1982, I shall recommend that the Respondent be required to offer all of them full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges and to make all of them whole for any loss of earnings they may have suffered by reason of the discrimination against them. Any backpay found to be due shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[1] the Respondent shall expunge from its personnel files and other records any reference to the discharges of these employees and notify them in writing that this has been done and that the evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

On the basis of the entire record, the findings of fact, and conclusions of law, I issue the following recommended[2]

ORDER

The Respondent, Frey Mechanical Contractors, Inc., El Paso, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees concerning their and other employees support for the Union.

(b) Threatening employees with discharge if they choose the Union to represent them.

(c) Discharging employees or otherwise discriminating against them in any manner with respect to their tenure of employment or any term or condition of employment because they engaged in activities on behalf of the Union or any other labor organization.

(d) In any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer Kurt Coppock, Donald Olson, Kenneth Slicker, William Bruce, Charles Hunsucker, and Stanford Daniel immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges and to make them whole for any loss of earnings in the manner set forth in the section entitled "The Remedy."

(b) Post at its place of business in El Paso, Texas, and if it is still continuing to do work at its jobsite in Houston, Texas, to also post there, copies of the attached notice marked "Appendix."[3] Copies of the attached notice, on forms provided by the Regional Director for Region 23, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days of this Order as to what steps the Respondent has taken to comply.

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[1] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[2] If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."